36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 599.

GEORGE W. MUNDY, ADMINISTRATOR OF GENERAL ELEAZUR W. RIPLEY.

[To accompany Bill H. R. No. 794.]

MAY 26, 1860.

Mr. TAPPAN, from the Committee of Claims, made the following

REPORT.

The Committee of Claims, to whom was referred the adverse report of the Court of Claims, in the case of George W. Mundy, administrator of the estate of Major General Eleazur W. Ripley, deceased, against the United States, have had the same under consideration, and ask to submit the following report:

In the year 1822 the United States brought two suits in the district court of the United States for the district of Louisiana, against General Ripley, late in command of the southwestern military district, to settle alleged balances claimed by the government, as stated by the accounting officers of the treasury.

The suits were consolidated and tried, and on the 29th of May, 1829, the jury found a verdict of over three thousand dollars for General Ripley, the defendant. The United States carried the case up to the Supreme Court on a writ of error, for the purpose, as stated by the Solicitor of the Treasury ordering the writ of error to be taken out, "*that the principle involved in the case might be settled in the Supreme Court of the United States.*"

General Ripley, in his defence, denied that he was indebted to the United States in manner and form as alleged, and claimed that he was entitled to the difference between his brevet and emoluments as a brigadier general; to an amount due him on account of subsistence; to the amount due him on his clothing, and contingent accounts, and for munitions; to the sum of nineteen thousand and sixty-three dollars and twenty-two cents for the disbursement of public money and other extra services, due him at law and equity according to a detailed statement given; and to an equitable allowance for other distinct services set forth and claimed.

He claimed to give these in evidence on the trial, and to prove their value, and prayed that the jury might find a verdict for the balance in his favor. Their admission was objected to on the part of the United States, and it was to settle the principle whether he was entitled to the allowances and extra compensation claimed, that the case

was taken to the Supreme Court. These were the issues between the parties.

In the argument of the case in the Supreme Court, the Attorney General insisted:

"1st. That no claims can be made [before a court and jury] which could not be allowed by the accounting officers of the treasury in the settlement of accounts."

"2d. That it was not intended that claims for services which could not be presented to those [accounting] officers, claims for services which were not, by the law regulating the duties of those who made the claims, authorized and designated, and for which the accounting officers of the treasury could not admit a right to compensation, should be submitted to a court and jury. The errors of the accounting officers in their construction of the laws could alone be brought before a court and jury."

"3d. It is admitted that if the credits or debits claimed against the government were of such a nature that they should have been allowed by the accounting officers, a court and jury have a right to judge of their amount or extent; but they must have been previously submitted at the treasury."

"4th. Although services may have been rendered, and the government may be bound in equity and good conscience to allow a compensation for them, yet if the Auditor of the Treasury could not allow for them, courts and juries cannot look into them."

Upon these points the Supreme Court replied as follows: "In behalf of the United States it is contended that the [district] court can only allow credits which the Auditor should have allowed; and that unliquidated damages cannot be set-off at law." "In the case of the United States *vs.* McDaniel, which has been decided at the present term, this court has said that the powers of the court and jury to admit credits against a demand of the government were not limited to items which should have been allowed by the Auditor. That in all cases where an equitable claim against the United States is set up by a defendant, which under the circumstances should have been allowed by an exercise of the discretionary power of the President, or the head of a department, it should be submitted to the jury under instructions from the court."

"Equitable as well as legal claims against the government are contemplated by the law as proper items of credit on the trial, and so this court decided in the case of the United States *vs.* Wilkins, reported in 6 Wheat., 135."

"If the disbursements made, for which compensation is claimed, were not such as were ordinarily attached to the duties of the office held by the defendant, the fact should have been so stated, and also that the service was performed under the sanction of the government, or under such circumstances as render the extra labor and responsibility assumed by the defendant in performing it necessary. Should the accounting officers of the Treasury Department refuse to allow an officer the established compensation which belongs to his station, the claim having been rejected by the proper department, should unquestionably be allowed by way of set-off to a demand of the government, by a court or jury."

"And it is equally clear that an equitable allowance should be made in the same manner for extra services performed by an officer, which did not come within the line of his official duty, and which has been performed under the sanction of the government, or under circumstances of peculiar emergency. In such a case the compensation should be graduated by the amount paid for like services under similar circumstances. Usage may safely be relied on as fixing a just compensation."—(See United States *vs.* Ripley, 7 Peters's Rep., 18, for the whole case.)

Thus the Supreme Court fully settled the "principle involved in the case," declaring the district court and jury competent to hear and allow the claims of General Ripley, including compensation for his extra labor and services, if he could show they were not within the line of his official duty, and were performed under the sanction of the government, or under circumstances of great emergency, and the rule for fixing the amount of compensation.

The cause went back to the district court with these instructions from the Supreme Court. The defendant amended his plea to correspond therewith, and upon the second trial went into full proof of his claim, and the jury returned the following verdict:

"The jury in this case find a verdict for the defendant for the sum of twenty thousand five hundred and ninety-six dollars and twelve cents, including his pension from the year 1814 to this date, at the rate of thirty dollars per month.

"CHARLES GARDNER, *Foreman.*

"NEW ORLEANS, *May* 29, 1835."

"Whereupon it is considered by the court that the plaintiffs take nothing by their petition, and that it be certified in conformity with the foregoing verdict that the plaintiffs are indebted unto the defendant in the sum of twenty thousand five hundred and ninety-six dollars and twelve cents."

The United States took a writ of error to this judgment to test the correctness of the allowance of the pension alone, as stipulated in the record, the other portion of the items in the verdict not being contested, and while it was pending in the Supreme Court, Congress ordered the pension to be paid, and the writ of error was dismissed.

To recover, then, the balance of this verdict and judgment, after deducting the amount of his pension, proceedings were instituted in the Court of Claims by the administrator of General Ripley.

The Court of Claims did not enter into an investigation of the merits of the claim, nor did the claimant, but he submitted the verdict and judgment, with the record of proceedings in the district and Supreme Courts, showing the case in detail and claiming the amount rendered on the faith of the judicial proceedings already had on the case. The Court of Claims decided that the verdict of the jury finding any amount due to the defendant, and the judgment thereon of the district court of the United States were of no binding force, being rendered without any authority of law, and had no more force and effect, and only amounted in law to a finding and judgment "that plaintiffs take nothing by their petition." The opinion of the court is based upon the doctrine of the sovereignty of the government—its immunity

from verdicts and judgments for defendants, as well as from adverse legal proceedings by plaintiffs.

Your committee concur with the Court of Claims in the general principle of the immunity of the sovereign from adverse legal proceedings in courts of justice. The doctrine, in its legitimate application, answers wise and important purposes. The government is also protected from adverse legal proceedings by the want of a mode of serving such process being prescribed by Congress; and it is equally protected from adverse process of execution on a judgment for the same reason, and because the Constitution prohibits the payment of any money from the treasury without a specific appropriation by law.

While your committee, therefore, concur in the foregoing principles, they do not think that a verdict and judgment rendered in favor of a defendant for such amount as may be found to be justly due him, in a suit instituted by the United States in her own courts to settle disputed accounts, are incompatible with the immunities and prerogatives of the government. It is true the payment of such verdicts and judgments cannot be enforced adversely, no more than simple contract debts; still, in the opinion of your committee, they have for every other purpose all the characteristics and virtues of verdicts and judgments in binding the parties and privies as to every fact and issue tried. All claims against the government, whether as simple contract debts, or by specialty or by judicial finding, can only be recovered or paid by a voluntary appropriation by Congress; otherwise they are alike inoperative, and so are even the judgments or reports of the Court of Claims itself.

Your committee are sustained in this view of the case by the precedents and practice of the government itself, and they will refer to a number of cases. In the case of the United States against James Reeside, tried in the circuit court of the United States for the eastern district of Pennsylvania, the jury found a very large amount due to the defendant, and the court entered a judgment thereon. The defendant's executrix commenced proceedings in the Court of Claims to recover the amount from the government, and the court reported a bill for its payment, mainly upon the ground that by the judiciary act of 1789 the laws of the several States were to be regarded as rules of decisions by the United States courts, and an early statute of Pennsylvania authorized juries to find and certify any balance due from plaintiff to defendant, and declaring such balance so found "*a debt of record.*" This was paid by an act of Congress —(11 Statutes at Large, 495–6.)

In Louisiana, where the case of General Ripley was tried, the civil code not only provides that the jury may find any balance due from plaintiff to defendant, and he shall have judgment for that amount, but there is an express statute to the same effect.—(Code of Practice, ed. of 1844, p. 137, §§ 367–9, 370–1; and Stat. Louisiana, February 17, 1821.)

In the case of Joseph Nourse, the circuit court of the United States for the District of Columbia referred a similar dispute between him and the government to arbitrators, who found a balance due from the United States to him. The court affirmed the finding by a decree;

it was carried to the Supreme Court and there affirmed, and it was paid by an act of Congress.—(9 Statutes at Large, 720.)

In the case of the United States against James Morrison's administrator a verdict and judgment were rendered for the defendant, and the amount so found due was ordered to be paid by an act of Congress.—(See 6 Statutes at Large, page 560.)

The United States *vs.* Balitha Laws, administrator, is another case in point. Laws was a contractor for furnishing brick and doing certain masonry work at Old Point Comfort and the Rip Raps. The work was completed, but before full payment was made Laws died. Upon the application of the administrator of Laws for the amount due, ($8,054 40,) the agent of the government refused payment, alleging that fraud had been committed by Laws in piling the brick in the kilns, by which the government sustained a loss of $11,921 60. The government instituted a suit to recover the difference between the amount claimed for Laws and the amount of the alleged damages, viz: $3,867 20; and upon the trial the jury rendered a verdict for the defendant, Laws, of $8,054 40. Congress passed an act ordering the payment of this verdict and judgment without any claim to re-examine it.—(6 Stat. at Large, 588.)

In the case of the United States *vs.* Satterlee Clark, which is a still stronger case, a verdict and judgment were rendered in favor of the defendant for $15,632. The committee in Congress reported as follows: "The memorialist was charged by the government as a defaulter and dismissed from the service; that afterwards suit was brought against him in the United States district court for the southern district of New York to recover the alleged balance of $13,103, and after full investigation of the matters in controversy, the jury, under the direction and ruling of the court, found and certified that there was justly due to the memorialist the sum of fifteen thousand six hundred and thirty-two ($15,632) dollars and sixty-one (61) cents. Without going into a reinvestigation of the matters of fact, which were examined and passed upon by the jury, the committee think that the government, as well as the memorialist, ought to be bound by their finding, and report a bill for his relief, and recommend its passage."

This report was unanimously concurred in, and Congress passed an act authorizing the payment of the full amount of the verdict and judgment.—(9 Statutes at Large, 784.)

In the case of Reeside's executrix, referred to in this report, which was a claim to recover the amount of a verdict and judgment rendered in favor of her testator, Gilchrist, C. J., in delivering the opinion of the Court of Claims, says: "It is argued that the United States cannot be sued; that a set-off is a cross-action, and that to holdthat this balance found due by the jury was a debt against the United States would be contrary to the doctrine that the sovereignty cannot be sued. But the United States have already, to a certain extent, consented that they may be sued by the act allowing a defendant to file a set-off. There is nothing in the law which prohibits the defendant from having allowed to him a larger sum than the United States are seeking to recover. If the balance found due from the United States has not the effect of a debt of record, what becomes of the provision of the act

of May 26, 1790, that a record shall have the same faith and credit which it has in the State court? We can in fact see no difference between the effect of a judgment between private persons of this character and a judgment in a case where the United States are plaintiffs, except the judgment cannot be enforced by execution against the United States. It is still a judgment upon the matters in issue, and its payment is left, not to the service of process, but to the faith of the United States. In one sense there can be, according to the argument for the United States, no debt whatever against the United States, because they may refuse to pay any claim, even the national debt, and no one has the power to enforce the payment of it. But it would be an extraordinary argument that they did not owe a debt because they had not themselves pointed out a means whereby a claimant could recover what would be considered a debt between man and man, and what is honestly a debt. And this is the very question before us: whether the United States do owe this debt, not whether there is any process by which to enforce it, for confessedly there is none. 'The right of a court to issue execution,' says Mr. Justice Story, in the case of Mills *vs.* Duryee, 'depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect independent of the right to issue execution. * * * * We can perceive no rational interpretation of the act of Congress unless it declares a judgment conclusive when a court of a particular State where it is rendered would pronounce the same decision. That the verdict and judgment thereon are conclusive also appears from the seventh article of the amendments to the Constitution, which provides that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'"

In the case now before your committee, the accounts made out by the accounting officers of the treasury against General Ripley, and the accounts of General Ripley against the government, are spread out upon the record of the trial in the district court. The law and the facts in dispute between the parties were the issues presented in the district court, the forum selected by the United States in which to try them with General Ripley. The Supreme Court of the United States decided the law in the case, that the defendant was entitled to an equitable compensation for disbursing the public money and for his extra labor and services rendered, if they were not within the line of his official duty as an officer in the army, and were performed by orders, or under the sanction of the government, or under circumstances of emergency; and also to the compensation and emoluments to which his official rank entitled him; and that the district court of the United States and jury were competent to investigate and determine them, according to the rules prescribed. The court and jury did try them accordingly, and the verdict and judgment were rendered as above stated.

Had the verdict and judgment been for the government instead of General Ripley, it would have been legal and binding enough to consign him to the walls of a prison until the uttermost farthing was

paid. Being in his favor, though it cannot be enforced by adverse process, for the reasons already assigned, yet your committee cannot see any reason why it ought not to have all the weight and sanctity of a verdict and judgment in favor of the government, of a judicial investigation by a competent judicial tribunal, which ought to commend its payment to Congress. And why not? Is litigation with the government never to have an end? Forty years have elapsed since the transactions occurred out of which this controversy arose; twenty-five years have elapsed since the trial; General Ripley, who knew all about it, is in his grave; his witnesses are dead, or scattered to parts unknown; his only daughter and heir, Mrs. Lawson, for whose benefit the prosecution of the claim is continued, has become deranged in mind and is in a lunatic asylum; each succeeding year renders the history of the transactions more and more obscure, and the reproduction of the evidence impracticable. To command the confidence of Congress, must the intestate's representative reproduce to the Court of Claims the evidence furnished to the district court and jury, to enable the former to determine whether the finding was correct? Without an allegation or suspicion of fraud or mistake, is it right and proper to treat the verdict and judgment as nullities, upon mere technical grounds, and require the whole case to be reopened and reheard? No court could legally do so, not even the Supreme Court.

To require that the merits of the case should be retried by the Court of Claims, or Congress, and the witnesses and evidence reproduced, would be equivalent to a denial of the claim. The case has passed a judicial ordeal, with all the lights and evidence then within reach of both parties, to which few cases have been subjected. It was twice tried, before two different juries, in presence of the parties or their counsel, before a United States judge, and twice before the Supreme Court of the United States, where the principles upon which it should be tried were settled and prescribed; and the question is fairly presented to Congress, whether it will take the decisions of these high tribunals and authorize the payment of the verdict and judgment, or repudiate their action upon the ground that they had neither authority nor capacity to adjudicate the questions of law and fact between the parties. This is the only question now presented.

The claimant in this case also claims interest upon the balance due upon the verdict and judgment. Your committee are aware that the allowance of interest on claims against the government has been more or less contested in certain cases. The general objection seems to be founded upon the presumption that the government is always ready to pay her debts; and this is not an unreasonable rule when applied to unsettled or unliquidated demands. But as regards claims which are ascertained and the amount adjusted especially by judicial investigation and decision, your committee are of opinion that the presumption of being always ready to pay is repelled, and interest ought to be paid from the date the government is found in default. In Thorndike *vs.* The United States, 2 Mason, 20, Mr. Justice Story said: "The United States have no prerogative to claim one law upon their own

contracts as creditors, and another as debtors. If as creditors they are entitled to interest, as debtors they are bound also to pay it."

Congress has adopted this rule in a number of cases, to a few of which your committee refer, as follows:

In the case of the United States *vs.* The Bank of the Metropolis, the jury found a verdict of $3,370 94 for the defendant. The Supreme Court affirmed the judgment, and Congress paid the principal, and interest thereon from the date of the judgment.—(9 Statutes at Large, 489.)

In the case of the United States *vs.* James Morrison's administrator, Congress ordered the interest to be paid.—(6 Statutes at Large, 560.) A similar act was passed for the relief of the executors of Charles Wilkins.—(6 Statutes at Large, 626.)

Congress has also authorized the payment of a judgment and interest thereon, recovered against an officer of the government, for injuries done to private property.—(6 Statutes at Large, 545.) Interest was also authorized to be paid by Congress on the amount of an award in favor of Joseph Wheation against the United States.—(6 Statutes at Large, 166.)

In the case of the executrix of James Reeside, already referred to, a case of sufficient magnitude to have commanded the attention of Congress, interest was authorized to be paid on the judgment from the date of its rendition, and it was paid.—(11 Statutes at Large.)

There is nothing peculiar in the foregoing cases entitling the claimants to any special favor over the present case. They were verdicts and judgments of the character of the present case.

Your committee, therefore, from a full examination of the whole case, are unanimously of opinion that the claim has been more thoroughly investigated by the district court and jury than it could be at this late day by the Court of Claims or Congress, and that the verdict and judgment are free from the slightest suspicion of unfairness. Having been obtained in accordance with the rulings of the Supreme Court should surely commend them to the full confidence of Congress. Under such circumstances, it would be as repugnant to the sense of justice of your committee as it would be discreditable to the government to interpose mere technical objections to the verdict and judgment, and require the claimant to reproduce his evidence and retry his case upon its merits.

The amount of the verdict and judgment, including the pension, was twenty thousand five hundred and ninety-six dollars and twelve cents. Deducting the pension therefrom, the same having been paid by authority of Congress, would leave a balance of thirteen thousand two hundred and forty-six dollars and twelve cents ($13,246 12) yet due and claimed by the administrator, for which your committee report a bill, with interest. But under all the circumstances of the case, the committee have adopted the time when the said claim was first presented for adjudication in the Court of Claims (October 12, 1857) as the proper date from which interest ought to be paid; and they therefore allow interest from that date, at the rate of six per centum per annum.